STATE OF MICHIGAN

IN THE SUPREME COURT

RUBEN CASTRO and CHRISTY CASTRO, jointly and severally, Plaintiffs-Appellees, v. JAMES ALAN GOULET, M.D., and JAMES ALAN GOULET, M.D. P.C., jointly and severally, Defendants-Appellants.	Supreme Court Case No. 152383 Court of Appeals Case No. 316639 Washtenaw County Circuit Court Case No. 13-138-NH Honorable David S. Swartz

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REPLY IN SUPPORT OF DEFENDANTS-APPELLANTS JAMES ALAN GOULET, M.D. AND JAMES ALAN GOULET, M.D., P.C.'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The themes that pervade the response to the application for leave to appeal are foreign to the jurisprudence of this state. Our law does not permit a litigant to sleep on his rights while waiting for adverse symptoms to subside. Nor should legal significance attach to Mr. Castro's perception of the difficulty he might encounter retaining an in-state expert or the "burden" he associates with obtaining an out-of-state expert. Respectfully, these are excuses, not legal doctrines. They neither slow nor halt the effect of an expiring statute of limitations.

In considering Mr. Castro's arguments, this Court must decide whether MCL 600.2912d(2) exists as an island onto itself – as Mr. Castro seems to advocate - or whether it must be harmonized and applied in the context of other statutory and common law doctrines. In other words, does MCL 600.2912d(2) permit a retroactive 28-day extension of the statute of limitations irrespective of when the contemplated motion is heard or granted? How, jurisprudentially, can this happen if the limitations period has since expired?

Defendants do not advocate an interpretation that gives MCL 600.2912d(2) no meaning at all. But it is not enough to say that the claim is preserved as long as the motion is heard and the extension-order entered within the 28-day extension period. In fact, there is no extension period unless and until the Trial Court so holds. Therefore, the only application that might be consistent with the now-settled jurisprudence of this state is to require that the extension motion be heard, granted and the order entered *before the statute of limitations has expired*. Any other interpretation would have the effect of bringing a claim back from the dead, a concept that simply has no precedent (or legal mechanism) in the jurisprudence of this State.

ARGUMENT

I. Mr. Castro Disregards the Central Holdings of *Barlett* and *Young*, Which Establish That the Mere Filing of a Motion to Extend Pursuant to MCL 600.2912d(2) Does Not Toll the Statute of Limitations.

Mr. Castro seeks to write on a clean slate unburdened by the holdings of published authority. That is wishful thinking. *Barlett*[1] and *Young*[2] preclude the disregard Mr. Castro urges upon this Court. In these cases, the Court of Appeals considered whether the statute of limitations is tolled at the time a motion to extend is filed, and held that it is not. Under MCL 600.2912d(2), it is the granting, not the seeking, of the extension that may have tolling effect. But that grant must occur before the statute of limitations expires. If the extension is granted after the statute of limitations expires, there is nothing left to toll.

In *Young*, the Court of Appeals concluded that "[a]lthough the Legislature provides an additional twenty-eight days to file an affidavit of merit for good cause, MCL 600.2912d(2), the mere filing of such a motion does not act to toll the period of limitation." 254 Mich App at 451. Likewise in *Barlett*, the Court rejected the assertion that dismissal was unwarranted because plaintiff filed a motion to extend "contemporaneously with the complaint, thereby tolling the period of limitation." 244 Mich App at 690. The Court explained that "[t]he plain language of subsection 2912d(2) indicates that the granting of an additional twenty-eight-day period in which to file an affidavit of merit *is not automatic*"; rather the "granting of a motion for additional time tolls the period of limitation." *Id.* at 691-692 (emphasis added).

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1 *Barlett v North Ottawa Cmty Hosp*, 244 Mich App 685; 625 NW2d 470 (2001).

2 *Young v Sellers*, 254 Mich App 447; 657 NW2d 555 (2002).

Because these rules emanate from the foundational principles of *Scarsella*[3] and *Ligons*,[4] as reiterated in *Tyra*,[5] they apply irrespective of whether the plaintiff omitted to notice the motion for immediate hearing and obtain a timely decision, as in *Barlett*, or neglected to timely file a previously-prepared affidavit of merit due to clerical error, as in *Young*. The reason for the delay is immaterial; once the statute of limitations has expired, MCL 600.2912d(2) has no effect.

This is what Mr. Castro fails to acknowledge. He views MCL 600.2912d(2) as an automatic 28-day extension of the limitations period. But the intent of the statute is not to toll or extend the limitations period whenever a motion to extend is filed. An extension might only be possible if good cause is shown, and the showing must be made to the trial court. Further, nothing in the statute allows for the retroactive revival of a time-barred claim. Surely, if that is what the Legislature intended, that is what the language would have said. But the Legislature did not use that language in MCL 600.2912d(2), and the omitted words cannot be read into the statute by giving it a meaning that it does not plainly express.

In the same vein, Mr. Castro would have this Court read MCL 600.2912d(2) in a vacuum, as if it were the only law to be considered. In fact, as this Court knows, MCL 600.2912d, the affidavit of merit statute, is but one part of the Revised Judicature Act. The statute of limitations is another part of that vast body of law. Nothing in MCL 600.2912d(2) purports to undermine the venerable limitations periods, when they are tolled, the effect of expired claims, and the like. MCL 600.2912d must be read so as to be consistent with those statutes and principles if at all possible. Here, it is possible.

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[3] *Scarsella v Pollak,* 461 Mich 547; 607 NW2d 711 (2000).

[4] *Ligons v Crittenton Hosp,* 490 Mich 61; 803 NW2d 271 (2011).

[5] *Tyra v Organ Procurement Agency of Michigan*, _ Mich _; _ NW2d _ (2015).

Mr. Castro relies upon dicta in *Solowy v Oakwood Hosp*, 454 Mich 214; 561 NW2d 843 (1997), as authority for interpreting MCL 600.2912d(2) as a retroactive tolling provision. As explained in the Application, MCL 600.2912d(2) was not at issue in *Solowy* and the dicta in *Solowy* is not precedent. But beyond that, contrary to Mr. Castro's suggestion, this is not the case *Solowy* contemplates. The issue in *Solowy* was "whether the six-month discovery rule period began to run when plaintiff learned of two possible causes for her lesion, one potentially actionable and one not, or whether it began to run only after her physician confirmed the potentially actionable diagnosis." *Id*. at 215-16. This Court concluded that the discovery period begins to run when a plaintiff knows of her injury and its possible cause. Here, Mr. Castro knew enough to consult an attorney and give notice of intent to assert a claim less than seven months after the surgery, and he continued to make demands regarding Dr. Goulet thereafter, including a threat to sue (made ten months before the lawsuit was actually commenced). Further, *Solowy* belies Mr. Castro's automatic extension theory, explaining that the "relief" afforded by MCL 600.2912d(2) is available "upon a showing of good cause." On this important statutory issue, leave to appeal should be granted.

II. Mr. Castro Fails to Give Meaning to the Good Cause Requirement.

Mr. Castro gives no effect to the good cause requirement beyond deference to the trial court's discretion. But discretion and good cause are clearly not synonymous. If discretion is the "freedom to decide what should be done in a particular situation,"[6] in this case, whether to allow a 28-day extension for filing an affidavit of merit, good cause is the standard by which the court's discretion is to be exercised. By failing to acknowledge that the standard bears independent meaning, Mr. Castro unpersuasively deprives it of effect. Quite clearly, the better

[6] http://www.oxforddictionaries.com/us/definition/american_english/discretion

rule is to define good cause to require a "legally sufficient or substantial reason." See e.g., *Russell v Miller (In re Utrera)*, 281 Mich App 1, 10-11; 761 NW2d 253 (2008).

Mr. Castro does nothing more than mimic the *Castro* majority's mantra of "reassurance" to satisfy the requisite good cause. But the undisputed facts - such as consulting a lawyer less than seven months after the surgery, filing a notice of intent, and making repeated demands regarding Dr. Goulet – are inconsistent with the restraint Mr. Castro purports to have exercised to avoid asserting a frivolous claim. On April 14, 2012, Mr. Castro's counsel threatened to file suit within 20 days. *See* Letter from James Wines (Exhibit N). This threat was made nearly ten months before the complaint was actually filed.

Further, Mr. Castro's purported reliance on reassurance that the symptoms would subside is belied by Mr. Castro's notice of intent, which proclaims in part:

> Dana Ohl, MD., stated individuals who have perineal pressure symptoms the same are resolved within several weeks of the cessation of using the bicycle seat. However, the fact of the matter is 6½ months have passed, since the surgical procedure, and Ruben C. Castro continues to suffer numbness . . . Sensation has not returned, his pain continues, and his erectile dysfunction also continues …

And, even if reassurance could be credited, it does not justify the lengthiness of Mr. Castro's delay.

Given *Castro's* stature as a published opinion, its misguided approach will unquestionably have sway on future litigants. But "reassurance" should not become the rule of law for tardy litigants who miss the statute of limitations or fail to timely satisfy the affidavit of merit requirement. As to this issue as well, leave to appeal should be granted.

CONCLUSION AND RELIEF REQUESTED

In this case, the *Castro* majority allowed an order extending the time to file an affidavit of merit, entered well after the statute of limitations expired, to resurrect a time-barred claim, creating a direct conflict with *Barlett*, *Young* and numerous other unpublished Court of Appeals

opinions that have relied upon *Barlett* and *Young*. The majority likewise misconstrued and misapplied the statutory "good cause" standard.

It is respectfully requested that this Court grant leave to appeal and peremptorily reverse or reverse after hearing the Court of Appeals decision in *Castro* and reinstate the Trial Court's order granting summary disposition in favor of Defendants-Appellants James Alan Goulet, M.D., and James Alan Goulet, M.D., P.C.

Respectfully submitted,

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Dated: November 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2015, I electronically filed the foregoing Reply in Support of Application for Leave to Appeal with the Clerk of the Court using the ECF system and served a copy upon James D. Wines, Esq., P.O. Box 130478, Ann Arbor, MI 48113-0478 by First Class Mail.

Dated: November 13, 2015

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